

**[J-1-2025] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

HAYLEY FREILICH,	:	No. 10 EAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered on
	:	July 6, 2023, at No. 327 CD 2022,
v.	:	affirming the Order of the Court of
	:	Common Pleas of Philadelphia
	:	County, Civil Division, entered on
SOUTHEASTERN PENNSYLVANIA	:	March 28, 2022, at No. 180600401
TRANSPORTATION AUTHORITY,	:	
	:	ARGUED: March 4, 2025
Appellee	:	

DISSENTING OPINION

JUSTICE DONOHUE

DECIDED: October 1, 2026

While walking in a crosswalk in downtown Philadelphia, Hayley Freilich sustained a life-altering injury when a Southeastern Pennsylvania Transportation Authority (“SEPTA”) bus ran over and crushed her left foot. As a result, Freilich required a partial amputation of her foot, accompanied by, among other procedures, skin grafts and tendon lengthening surgeries. She suffered permanent nerve damage and will need medical care for the rest of her life. Freilich sued SEPTA claiming that its bus negligently struck her and caused her injuries. After SEPTA admitted liability, the parties entered into a stipulated jury verdict totaling \$7,000,000. Upon SEPTA’s motion, the trial court then molded this verdict to \$250,000 as required by statute.

Pursuant to 1 Pa.C.S. § 2310, the Commonwealth is entitled to the defense of “sovereign immunity,” making it “immune from suit except” where “specifically waive[d]”

by the General Assembly. Section 8522 of the Sovereign Immunity Act¹ waives “the defense of sovereign immunity” for certain claims brought against the Commonwealth, including those, like Freilich’s, arising from a Commonwealth party’s “operation of any motor vehicle.” 42 Pa.C.S. § 8522.² Section 8528, in turn, caps the amount a claimant can recover from the Commonwealth at \$250,000 for any one “cause of action or transaction or occurrence” or \$1,000,000 where there is a “series of causes of action or transactions or occurrences.” *Id.* § 8528(b).³ This Court has twice held that a cap on

¹ 42 Pa.C.S. §§ 8521-8528.

² Section 8522 provides, in relevant part:

(a) Liability imposed.--The General Assembly, pursuant to [S]ection 11 of Article I of the Constitution of Pennsylvania, does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in [S]ection 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.

(b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(1) Vehicle liability.--The operation of any motor vehicle in the possession or control of a Commonwealth party. As used in this paragraph, “motor vehicle” means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

42 Pa.C.S. § 8522.

³ Section 8528 provides, in relevant part:

(continued...)

damages survives scrutiny against constitutional challenges. See *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096 (Pa. 2014) (upholding as constitutional the Tort Claim’s Act’s cap on damages of \$500,000 in suits against political subdivisions, 42 Pa.C.S. § 8553); *Smith v. City of Phila.*, 516 A.2d 306 (Pa. 1986) (same). Today, based on the facts before us, the Majority does so for a third time and upholds the trial court’s order reducing Freilich’s damages award from \$7,000,000 to \$250,000.

Freilich challenges the constitutionality of the damages cap under Article I, Section 6 (“Section 6”)⁴ and Article I, Section 11 (“Section 11”)⁵ of our Constitution. Her argument under Section 6 mirrors the suggestion of then-Justice Baer’s concurrence in *Zauflik* where he opined that “a victim may be able to establish that the statutory damages cap constitutes an onerous procedural barrier to the jury trial right” as applied to them “through a properly developed record.” *Zauflik*, 104 A.3d at 1134 (Baer, J., concurring). As the Majority correctly recognizes, however, even a claim brought in the broad mold of Justice Baer’s concurrence cannot “cannot survive the logic of [the] *Zauflik*” Court’s holding. Majority Op. at 23. Despite her attempts to distinguish her claim, this case is essentially

(a) General rule.--Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

(b) Amount recoverable.--Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.

⁴ “Trial by jury shall be as heretofore, and the right thereof remain inviolate.” PA. CONST. art. I, § 6.

⁵ “All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.” PA. CONST. art. I, § 11.

Zauflik revisited. There, as here, “the damages cap did not alter the availability, or contours of, a jury trial.” *Id.*

With respect to Section 11, Freilich argues that the damages cap is unconstitutional “where [it] has not been adjusted in more than forty years” and the limited recovery “would render ... [a] remedy illusory.” Freilich’s Brief at 62. The Majority rejects this conceptualization of Section 11, finding that *Smith v. City of Philadelphia*—where we first stated that the General Assembly has plenary power to control suits against the Commonwealth, including the power to limit recovery—controls Freilich’s challenge. Freilich does not ask us to reconsider *Smith*. Accordingly, the Majority rejects her claim, applying the *Smith* Court’s reasoning that Section 11 grants “the General Assembly[] unfettered authority with respect to recovery against the Commonwealth.” Majority Op. at 29.

In my view, *Smith*’s analysis is fatally flawed and its conclusion palpably incorrect. Despite Freilich’s decision not to question *Smith*,⁶ I would revisit it sua sponte. *Smith*’s distorted holdings prevent any reasoned consideration of a challenge like Freilich’s that questions the authority of the Legislature to limit the recovery of a tort victim who otherwise has a right to sue the Commonwealth. In reaching its decision, the *Smith* Court relied on conclusory reasoning and a mistaken understanding of history. It engaged in a cursory constitutional analysis that is woefully insufficient by today’s standards and those at the time *Smith* was decided. As detailed below, a structured interpretation of Section 11 and Article III, Section 18 of the Pennsylvania Constitution (“Section 18”)⁷ establishes

⁶ In her brief before this Court, Zauflik suggested that *Smith* was wrongly decided without asking the Court to overturn its decision. See Zauflik’s Brief at 37-38.

⁷ “The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of (continued...) ”

that, while the General Assembly's powers to govern suits against the Commonwealth are broad, they are not unlimited and the power to set dollar-amount limitations on damages is not among them. In light of the clarity of these constitutional provisions, *Smith* cannot stand. Moreover, as I detail, stare decisis does not favor its retention. Accordingly, I would overrule *Smith* and hold Section 8528's cap on damages unconstitutional.

A majority of the members of this Court have twice joined concurring opinions lambasting the damages cap as a "substantial injustice," *Grove v. Port Auth. of Allegheny Cnty.*, 218 A.3d 877, 890 (Pa. 2019) (Baer, J., concurring) (joined by Justices Donohue, Dougherty, and Mundy), and a "tyranny of injury without compensation," *Zauflik*, 104 A.3d at 1135 (Baer, J., concurring) (joined by then-Justice Todd). Even today, the author of the Majority Opinion, joined by two of my colleagues, assumes Chief Justice Baer's mantle when she "echo[es] [his] lament" that the current damages cap is "grossly inadequate." Concurring Op. at 2, 3 (Todd, C.J.). However, the problem is not the inadequacy of the cap; it is the existence of a damages cap in the first place.

"[T]here is no absolute jurisprudential bar to this Court's sua sponte reconsideration of precedent." *Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 215 (Pa. 2010). Indeed, on multiple occasions this Court has acknowledged the importance, even necessity, of addressing a prior decision's correctness where no party asked the Court to engage in such an analysis. See *id.* (collecting seven other cases "in which this Court has sua sponte reconsidered and overruled prior precedent"). For example, most

employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but **in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property**, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted." PA. CONST. art. III, § 18 (emphasis added).

recently, this Court was asked to consider the justiciability of claims that the Commonwealth and its various subdivisions failed to “provide for the maintenance and support of a thorough and efficient system of public education,” as mandated by Article III, Section 14 of our Constitution. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 417 (Pa. 2017) (quoting PA. CONST. art. III, § 14). Consideration of these claims required an examination of a previous line of cases culminating in *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999), where this Court wholesale adopted, without reasoning, the Commonwealth Court’s holding that similar claims were non-justiciable political questions. The challengers in *William Penn School District* “decline[d] to suggest that this Court should abrogate” *Marrero* and its progeny, instead attempting to “harmonize” those cases with their claims. *William Penn School District*, 170 A.3d at 446, 446 n.49. In its briefing, the Department of Education underscored that the continued tenability of *Marrero* was beyond the scope of this Court’s grant of allocatur.

While the reconsideration of our prior case law was “not expressed in the questions as to which we granted review,” we declined to ignore the viability of those decisions where “our final determination as to whether and how they apply to [the] case require[d] us to consider their internal consistency as well as the cogency of their reasoning.” *Id.* at 446 n.49. “When presented with a case that hinges upon our interpretation and application of prior case law, the validity of that case law always is subject to consideration.” *Id.* at 457. Were this Court to constrain itself to “revisit[ing] the soundness of our case law only when expressly invited to do so,” we “would encourage the perpetuation of poorly reasoned precedent.” *Id.* at 446 n.49. “The scope of our review,” we explained, “is not so circumscribed.” *Id.*

As such, the Court determined that it was “not bound to follow precedent [that] cannot bear scrutiny.” *Id.* at 456. We found the “irreconcilable deficiencies” in the *Marrero*

line of cases so erroneous that they warranted “purify[ing] the body of law.” *Id.* at 457 (quoting *Lewis v. W.C.A.B. (Giles & Ransome, Inc.)*, 919 A.2d 922, 928 (Pa. 2007)). Accordingly, we declined to follow *Marrero* and its progeny and held that the challengers’ claim was capable of judicial determination.

I find the posture of this case indistinguishable from *William Penn School District*. Just as the Article III, Section 14 claim in *William Penn School District* turned on *Marrero*, Freilich’s Section 11 claim hinges upon our acceptance and application of *Smith*. Therefore, “the validity of” *Smith* “is subject to consideration” and this Court may “follow the exercise of our interpretive function wherever it leads.” *Id.* This is particularly true where the challengers to the damages cap have repeatedly attempted “to distinguish” *Smith* instead of “attack[ing] [it] frontally.” *Id.* at 446 n.49. This Court need not “look the other way” solely on account of Freilich’s “tactical decision” to not ask us to revisit our prior case law. *Id.* Since the application of the damages cap to Freilich’s claim hinges on *Smith*’s continued vitality, the decision must be revisited.

The Majority chastises my decision to reconsider *Smith*, labeling it “inappropriate and unwise.”⁸ Majority Op. at 32. But the Majority admits that “there are rare occasions in which our Court appropriately reconsidered precedent sua sponte.” *Id.* at 34. Indeed, this Court, per the author of the Majority opinion here, has invoked those occasions as support for the overruling of a prior decision without being asked to do so. See *Freed*, 5 A.3d at 215 (citing *Commonwealth v. Collins*, 888 A.2d 564, 568-73 (Pa. 2005); *Cimaszewski v. Bd. of Prob. & Parole*, 868 A.2d 416, 427 (Pa. 2005); *Commonwealth v. Freeman*, 827 A.2d 385, 393-403 (Pa. 2003); *Commonwealth v. Grant*, 813 A.2d 726, 737-38 (Pa. 2002); *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998)). Similarly,

⁸ To the contrary, what is inappropriate and unwise is the perpetuation of blatantly incorrect constitutional interpretation.

the High Court has overruled precedent interpreting the Federal Constitution even where the appellant “chose to urge what may have appeared to be the surer ground for favorable disposition” instead of “insist[ing] that [a prior decision] be overruled.” *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961). While these situations are admittedly rare, as the Majority contends, they are not without precedent.

As to the charge that this case is distinguishable from *William Penn School District*, the Majority is wrong. In *William Penn School District*, the appellants did not contest *Marrero*’s holding that there were “no judicially manageable standards in place for resolving” a claim that a particular school “lacked sufficient funding to provide students an adequate education.” Appellants’ Brief at 28 (internal quotations omitted). Instead, the appellants argued that *Marrero* was distinguishable because *Marrero* did not consider an equal protection challenge akin to the one raised in that case. *Id.* at 22. This Court disagreed, finding that “*Marrero* [] necessarily inform[ed] our consideration regarding the justiciability of [appellant’s] Education Clause and equal protection claims.” *William Penn School District*, 170 A.3d at 445. Accordingly, we proceeded to reconsider *Marrero* even where the appellants “decline[d] to suggest that this Court should abrogate our prior case law.” *Id.* at 446 n.49.

The posture in *William Penn School District* mirrors the posture of this case. Here, as there, Freilich recognizes that the cap on “damages against the sovereign survive[s] facial challenge under ... *Smith*.” Freilich’s Brief at 62. Freilich, however, “does not seek abrogation of [that] decision” but instead argues that her as-applied “constitutional challenge is distinct from ... *Smith*” and therefore not controlled by that decision.⁹ *Id.* But,

⁹ The Majority makes much of the fact that Freilich challenges the damages cap as applied to her but I consider its facial constitutionality. See Majority Op. at 32-34. I readily agree with the Majority that “facial challenge[s] and [] as-applied challenge[s] are legally distinct.” *Id.* at 33. A law is facially unconstitutional “only where no set of circumstances exist under which the statute would be valid.” *Clifton v. Allegheny Cnty.*, 969 A.2d 1197, (continued...)

1222 (Pa. 2009). An as-applied constitutional challenge “does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *Commonwealth v. Shifflett*, 335 A.3d 1158, 1165 (Pa. 2025) (citation omitted). However, the Majority overstates the significance of the distinction by suggesting that Freilich’s strategic choice to bring only an as-applied challenge somehow constrains our analysis as to what the Constitution means. See *Commonwealth v. Pownall*, 278 A.3d 885, 907 (Pa. 2022) (“[A] litigant’s characterization of a[constitutional challenge] as being facial or ‘as applied’ is not controlling.”) (citation omitted); *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 15 (2012) (“[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.”) (citation omitted).

Both facial and as-applied constitutional challenges present questions of law for which our standard of review is de novo and our scope of review is plenary. *Commonwealth v. Hunte*, 337 A.3d 483, 497 (Pa. 2025); *Martin v. Donegal Twp.*, 325 A.3d 502, 509 (Pa. 2024). The first step in ascertaining whether a statute violates the Constitution, either facially or as-applied, requires analysis of the constitutional provision at issue. See *id.* (finding first that Article VI, Section 7 of the Constitution, “by its express terms, applies only when a civil officer is ‘removed’ from office” to then reject an as-applied challenge to a statute brought by a plaintiff who was not “removed” from office). In certain circumstances, such as the instant case, the text of the Constitution may be so clear as to categorically prohibit the challenged aspect of the statute at issue. Given my determination that Section 11 and Section 18 both bar the General Assembly from enacting a damages cap, the as-applied nature of Freilich’s claim becomes moot. Because the Constitutional bar on damages caps is categorical, it makes no difference how the damages cap at issue affects Freilich specifically.

While the Majority takes issue with my conclusion that the damages cap is facially unconstitutional, the Majority’s holding is just as broad, albeit in the opposite direction to uphold the facial constitutionality of any damages cap. The Majority relies on *Smith* and its rationale that “[i]f the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted.” Majority Op. at 28 (quoting *Smith*, 516 A.2d at 309). Deeming “this reasoning to be controlling here[.]” the Majority explains that “to afford [Freilich] relief on an as-applied basis would be contrary to our holdings for over 40 years regarding the General Assembly’s **unfettered authority** with respect to recovery against the Commonwealth.” *Id.* at 29 (emphasis added). The amount of the damages cap and the specific circumstances of Freilich’s case have no impact on the Majority’s analysis. Its rejection of Freilich’s as-applied challenge is in fact a broad pronouncement that any damages cap is permissible.

Moreover, although I find the damages cap facially unconstitutional, Freilich is entitled to the relief requested, which is to reverse the trial court’s order molding Freilich’s stipulated verdict. Freilich’s Brief at 67. Because a proper interpretation of our Constitution bars the imposition of a cap on damages in cases for personal injury, even against the (continued...)

as the Majority rightly recognizes, the “reasoning” of *Smith* is “controlling here.” Majority Op. at 29. Thus, like in *William Penn School District*, we may reconsider *Smith* in light of Freilich’s challenge.^{10, 11} As this Court observed: “We would encourage the perpetuation

sovereign, see *infra* pp. 20-39, vacatur of the trial court’s order molding the verdict in accordance with 42 Pa.C.S. § 8528(b) is mandated.

¹⁰ The Majority makes two specific claims about *William Penn School District* that merit particular attention. First, the Majority asserts that the questions upon which we granted review in that case “called for a reexamination of *Marrero*.” Majority Op. at 34. But this understanding contradicts the views of the *William Penn School District* Court which observed that “the question of the ongoing tenability of [] *Marrero* ... is not expressed in the questions as to which we granted review.” *William Penn School District*, 170 A.3d at 446 n.49. Thus, the reasoning of *William Penn School District* rests on the assumption that reconsideration of *Marrero* was not encapsulated in the issues upon which we granted review.

Second, the Majority claims that “the appellants in *William Penn [School District]* specifically asked our Court to overrule *Marrero*,” citing the appellants’ reply brief. Majority Op. at 35. The suggestion that an issue not previously raised can be raised in a reply brief is an unsupportable proposition. See *Commonwealth v. Fahy*, 737 A.2d 214, 218 n.8 (Pa. 1999). Moreover, the Majority’s revisionist discussion of *William Penn School District* contradicts the understanding of this Court as expressed in the opinion in that case. There, the Court stated that it viewed the appellants as not having asked the Court to “abrogate our prior case law.” *William Penn School District*, 170 A.3d at 446 n.49; see also *id.* at 457 (“When presented with a case that hinges upon our interpretation and application of prior case law, the validity of that case law always is subject to consideration.”). Accordingly, the reasoning of *William Penn School District* speaks directly to a situation where, as here, the appellant has not asked the Court to overrule a prior decision.

¹¹ The concurring opinion authored by Justice Dougherty, while acknowledging there is no jurisprudential bar to reconsidering precedent sua sponte, agrees with the Majority that “this is not one of those cases.” Concurring Op. at 3 (Dougherty, J.) (quoting Majority Op. at 34). Like the Majority, the concurring opinion stresses that Freilich brought an as-applied challenge and “that it would be ‘unfair’ for this Court to retroactively convert on our own motion Freilich’s claims into ‘a facial challenge to Section 8528 without advocacy from [her], the Attorney General, and SEPTA.’” *Id.* (quoting Majority Op. at 36). It is “[f]or that reason, [Justice Dougherty is] unable to join the dissent.” *Id.* at 4. First, undeveloped advocacy is inherent in sua sponte reconsideration. We have not found this to be an impediment when sua sponte reconsideration was warranted previously. Further, “a litigant’s characterization of a[constitutional challenge] as being facial or ‘as applied’ is not controlling.” *Pownall*, 278 A.3d at 907 (citation omitted); see *supra* note 9. What is controlling is the text of our Constitution. Finally, and respectfully, if a case that presents (continued...)

of poorly reasoned precedent were we to permit ourselves to revisit the soundness of our case law only when expressly invited to do so based upon a given party's tactical decision of whether to attack adverse case law frontally (always a gamble against long odds) or to attempt more finely to distinguish the adverse decisions." *William Penn School District*, 170 A.3d at 446 n.49.

Smith v. City of Philadelphia

Smith arose from a gas explosion in Philadelphia that injured several people, killing seven. Seventy-two claimants brought forty-four separate tort actions against the City of Philadelphia for personal injury and property damage. While their tort actions were pending, Ruth Smith and two co-plaintiffs (collectively "Plaintiffs") filed a separate declaratory judgment action seeking a declaration that the Tort Claims Act's¹² damages cap of \$500,000 was unconstitutional under Section 11 and Section 18 of the Pennsylvania Constitution.¹³ The Plaintiffs understood that, absent such a determination, the Tort Claims Act would limit recovery against the City of Philadelphia. See *Carroll v. York Cnty.*, 437 A.2d 394, 396 (Pa. 1981) (holding the Tort Claims Act's grant "of tort immunity upon political subdivisions is within the scope of the Legislature's authority pursuant to [§] Section 11."). The Plaintiffs moved for summary judgment and the Court of

a blatantly incorrect constitutional interpretation that mandates inadequate compensation to Pennsylvanians who are severely injured or maimed by government entities is not worthy of sua sponte reconsideration, then what case is?

¹² 42 Pa.C.S. §§ 8541-8564. Whereas the Sovereign Immunity Act controls suits against the Commonwealth and limits its liability to \$250,000 per claim, the Tort Claims Act controls suits against local government agencies and limits their liability to \$500,000 per claim.

¹³ The Plaintiffs additionally brought equal protection claims under the Pennsylvania and Federal Constitutions, but the Court's disposition of these claims is immaterial to the case before us today.

Common Pleas granted their motion, holding that the Tort Claims Act's damages cap was unconstitutional. The City of Philadelphia filed a direct appeal to this Court.¹⁴

Before turning to the *Smith* Court's analysis of Section 11, it is important to understand the background underlying the Court's decision. Five years prior to *Smith*, this Court considered the constitutionality of the Tort Claims Act for the first time in *Carroll v. York County*. There, instead of challenging the Tort Claims Act's damages cap, the challengers argued that the act generally violated Section 11 by "denying them a 'remedy by due course of law.'" *Carroll*, 437 A.2d at 396 (quoting PA. CONST. art. I, § 11). The Court rejected the challengers' argument outright, noting Section 11's limitation on the right to a remedy contained within its second sentence: "Suits may be brought against the Commonwealth in such manner and in such cases as the Legislature may by law direct." *Id.* (quoting PA. CONST. art. I, § 11). We described this "concluding sentence" as "an integral, unequivocal and controlling portion" of Section 11. *Id.* Further, we highlighted our then-recent holding that Section 11 is "neutral" as to sovereign immunity, i.e., "it neither requires nor prohibits" the doctrine. *Id.* (quoting *Mayle v. Pa. Dep't of Highways*, 388 A.2d 709, 716 (Pa. 1978)). As such, we found that the Tort Claims Act did not violate the challengers' right to a remedy.

Against this backdrop, the *Smith* Court addressed the Plaintiffs' more specific claim that, while the General Assembly permitted suit against political subdivisions by waiving sovereign immunity, it had no power to limit claimants' recovery. In one paragraph of analysis, the Court concluded that the greater power to "abolish a cause of action" against the Commonwealth "surely" included the lesser power to "limit the recovery on the actions which are permitted." *Smith*, 516 A.2d at 309. "To hold

¹⁴ The Judicial Code grants this Court "exclusive jurisdiction of appeals from final orders" that hold "invalid as repugnant ... to the Constitution of this Commonwealth ... any provision ... of any statute of [] this Commonwealth." 42 Pa.C.S. § 722(7).

otherwise,” the Court concluded, would be “to grant with one hand what [it] t[ook] away with the other.” *Id.* The Court underscored that the second sentence of Section 11 granted the General Assembly the power to determine “not only the cases” in which the Commonwealth may be sued, “but also the manner and the courts in which cases against [it] may be brought.” *Id.* Without explanation, we described this power as “complete control over suits brought against the Commonwealth” including control over the Plaintiffs’ recovery. *Id.* Accordingly, we held that Section 11 does not “prohibit the Legislature from enacting a limit on the tort liability of its political subdivisions.” *Id.*

In addition to their Section 11 argument, the Plaintiffs challenged the damages cap under Section 18’s seemingly clear mandate that “in no [] cases [other than workers compensation] shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property.” *Id.* at 308 (quoting PA. CONST. art. III, § 18). Rather than adhering to its plain text, however, the Court emphasized that “the full scope and meaning of [Section 18] should be considered ... in light of the evil intended to be remedied by its adoption.” *Id.* at 309 (quoting *Singer v. Sheppard*, 346 A.2d 897, 901 (Pa. 1975)). That “evil,” as the Court explained, was the amassing of “powerful private interests” that had garnered sufficient influence to lobby for legislation that specially favored them. *Id.* Specifically, the Court identified the Act of April 4, 1868, P.L. 58, No. 26 (the “Railroad Act”), which “limited recoveries in negligence actions against railroads and other common carriers.” *Id.* “The corporations who effected this legislation were perceived by the [f]ramers as a privileged and powerful class of overreachers who had purchased special, self-serving legislation, and Article III, Section 18 was meant to prevent such powerful private interests from unduly affecting the legislative process.” *Id.* (citing *Debates of the Convention to Amend the Constitution of Pennsylvania*, Vol. II at 742-44 (1873)).

Turning to the Plaintiffs' claims, the Court determined, despite the lack of textual support for its conclusion, that Section 18 was intended to address only "private, not governmental defendants." *Id.* The Court stressed that "the [f]ramers would have had no occasion to apply the prohibition against limiting damages to [the Commonwealth]," because the Commonwealth, "at that time, was immune from suit." *Id.*¹⁵ Accordingly, the Court held that Section 18 only prohibits the General Assembly from limiting recovery against private parties, not the Commonwealth.

Justice Papadakos authored the principal dissent, joined by Justice Larsen. Justice Papadakos highlighted that the Court had recently settled upon a reading of Section 11 that permits "the Legislature to raise the shield of immunity at will," while not requiring it to do so. *Smith*, 516 A.2d at 316 (Papadakos, J., dissenting) (citing *Mayle*, 388 A.2d at 716).¹⁶ In his view, however, the power to enact sovereign immunity by statute "must be read in such a manner [] that it does not qualify the imperative of" the right to a remedy enshrined in the first sentence. *Id.* Accordingly, Justice Papadakos concluded that "the only reasonable meaning of the second sentence, in context, is that the people have given the Legislature the option of creating a separate procedure for the

¹⁵ Sovereign immunity applied to the Commonwealth as a matter of common law until 1978 when this Court abrogated the doctrine. See *Mayle v. Pa. Dep't of Highways*, 388 A.2d 709 (Pa. 1978). The General Assembly subsequently reenacted sovereign immunity through statute, subject to enumerated waivers. See 42 Pa.C.S. §§ 8521-8528 (1980) (Sovereign Immunity Act); *id.* §§ 8541-8564 (1978) (Tort Claims Act). These statutes were designed "to resurrect the doctrine [of sovereign immunity] (albeit legislatively) to its pre-*Mayle* status." *MFW Wine Co., LLC v. Pa. Liquor Control Bd.*, 318 A.3d 100, 131 (Pa. 2024).

¹⁶ At points throughout his dissent, Justice Papadakos underscored his belief that the *Mayle* Court incorrectly held that Section 11 was "neutral" as to sovereign immunity. Although not expressly stated, it is apparent that he viewed Section 11 as inconsistent with legislation that completely immunizes the Commonwealth from liability. See *Smith*, 516 A.2d at 316-17 (Papadakos, J. dissenting) ("To the extent that [the Tort Claims Act or Sovereign Immunity Act] attempts to create a [complete] shield of immunity for injuries caused, I would hold those sections to be unconstitutional.").

litigation of cases where [the Commonwealth] or its subdivisions are involved.” *Id.* He observed that the General Assembly had enacted statutes creating “countless [b]oards, [c]ommissions, [a]gencies and [c]ourts [] for this very purpose.” *Id.* at 317 (citing “the Administrative Code, Eminent Domain Code, Liquor Code, Municipalities Planning Code, various City, Borough, Township, and County Codes, Vehicle Codes, and Jurisdiction of the Commonwealth Court”). In sum, Justice Papadakos believed that “the plain, untechnical language of Section 11” gives the General Assembly the power to fashion “special [c]ourts, [b]oards and [t]ribunals to handle controversies where [the Commonwealth] or [its] instrumentalities are parties.” *Id.*

Independent of Section 11, Justice Papadakos read Section 18 as a “clear, unambiguous, mandatory, self-executing restraint on legislative power.” *Id.* He rebuked the majority’s reliance on the commentaries from the Constitutional Convention of 1874, positing that these notes “give [the Court] no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law.” *Id.* at 318 (quoting *Commonwealth v. Balph*, 3 A. 220, 229 (Pa. 1886)). Instead, Justice Papadakos considered it best “to construe the Constitution from what appears upon its face.” *Id.* (quoting *Balph*, 3 A. at 229). He emphasized that “[t]his is one of the oldest [r]ules of [c]onstruction in the Commonwealth.” *Id.* at 317. Section 18, on its face, contains “[n]o limitation or exception” to the general prohibition on legislation capping recovery in actions for injury to person or property. *Id.* at 318.

Justice Papadakos disagreed with the majority’s conclusion that the 1874 framers had no occasion to consider limitations on damages against the Commonwealth because the Commonwealth was immune as a matter of common law at the time. According to Justice Papadakos, “such a conclusion ignores history” relevant at the time of the 1874

constitutional convention. *Id.* He pointed to “[e]xtensive legislation” already in existence in 1874 that permitted suits against the Commonwealth for “eminent domain cases, for contract breaches, [and for] escheat matters.” *Id.* Further, Justice Papadakos emphasized that in 1874, “the Legislature was known to authorize, by statute, the appearance of the Attorney General before this Court to defend actions against the Commonwealth and to authorize the appropriation of monies to pay for damages owed by the Commonwealth, **without limitation.**” *Id.* at 317 (emphasis in original). This contemporaneous history, in Justice Papadakos’ view, supported the conclusion that the 1874 framers were familiar with legislation permitting suits against the Commonwealth but nevertheless wrote Section 18 as a broad commandment, without exemption for the Commonwealth.

Finally, regarding public policy, Justice Papadakos rejected the view that sovereign immunity protects the public fisc from extensive liability. He highlighted that in the case before him, for example, all seventy-two claimants would be “forced to share an aggregate \$500,000, which will be insultingly inadequate to compensate many of them for their losses.” *Id.* at 319. In turn, “these undercompensated victims of catastrophic proportions will quickly exhaust their meager recovery and become charges upon the very Commonwealth that should have adequately compensated them in the first place.” *Id.* Thus, Justice Papadakos considered the protective value of the damages cap “illusory” at best. *Id.*

As evidenced by the foregoing summary, the *Smith* Court majority’s analysis, at a minimum, lacks the typical rigor associated with this Court’s interpretation of the Constitution. A decision that “spen[ds] almost no time grappling” with the text of the Constitution and performs an “analysis of its own creation” is “gravely” erroneous. *Ramos*

v. Louisiana, 590 U.S. 83, 103 (2020). The *Smith* Court conducted no analysis of the meaning of the text of Section 11. In toto, the Court's reasoning consisted of the following:

We begin our review of the lower court's holding by observing, as mentioned earlier, Article I, Section 11 of the Pennsylvania Constitution permits the legislature to regulate the manner, the courts and the cases in which suits may be brought against the Commonwealth. In granting the legislature power to control not only the cases, but also the manner and the courts in which cases against the Commonwealth may be brought, the [f]ramers intended that the legislature have complete control over suits brought against the Commonwealth. Plaintiffs agree that the legislature has complete control in that it could abolish altogether the right to recover against the Commonwealth in tort actions, but they assert that the legislature has no power to limit the amount of recovery in actions which it has said may be brought. We disagree. If the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted. To hold otherwise would be, in our view, to grant with one hand what we take away with the other. Such a result would be absurd, or at least, unreasonable. We conclude, therefore, that Article I, Section 11 should not be read to prohibit the Legislature from enacting a limit on the tort liability of its political subdivisions.

Smith, 516 A.2d at 308-09. As evidenced, the Court based its entire analysis on the assumption that the greater power to completely bar cases against the Commonwealth necessarily includes the lesser power to limit recovery for claims that are otherwise permitted. It cited no support for this proposition nor attempted to explain how limits on recovery are permitted under the specific language contained in Section 11. Instead, the Court summarily stated that “the [f]ramers intended that the legislature have complete control over suits brought against the Commonwealth.” *Id.* at 309. Absent from the decision was any explanation as to how the three phrases used in Section 11—“in such manner,” “in such courts,” and “in such cases”—convey the limitless panoply of powers that the *Smith* Court described. This Court has repeatedly echoed that “[t]he touchstone of interpretation of a constitutional provision is the actual language of the Constitution

itself.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018); see also *Ieropoli v. AC & S Corp.*, 842 A.2d 919, 925 (Pa. 2004). A failure to engage in this first step of constitutional interpretation indicates a serious flaw in a decision’s reasoning.

Not only was the *Smith* Court’s examination of Section 11 lacking in textual analysis, but the foundation upon which it based its decision—that the power to bar all cases against the Commonwealth necessarily includes the power to set limits on damages—was simply incorrect. The Court reasoned that because the General Assembly could “abolish a cause of action, surely it [could] also limit the recovery on the actions which are permitted.” *Smith*, 516 A.2d at 309. But this proposition misunderstands the General Assembly’s power to determine “in [which] cases” “[s]uits may be brought against the Commonwealth.” PA. CONST. art. I, § 11. As discussed in detail below, this power reflects the General Assembly’s ability to select which cases against the sovereign courts of this Commonwealth will have jurisdiction to hear. By enacting a statute, for example, that permits breach of contract claims against the Commonwealth but not negligence claims, the General Assembly does not abolish negligence as a cause of action—it merely limits the jurisdiction of Pennsylvania courts to hear such claims. A limitation on a court’s jurisdiction to hear certain claims against the Commonwealth and a limitation on damages in a claim over which the court has jurisdiction are distinct legal concepts. Contrary to the *Smith* Court’s logic, control of the former does not entail control of the latter.

The *Smith* Court’s analysis of Section 18 suffers from similar defects. Relying on this Court’s repeated assertion that “the full scope and meaning of [Section 18] should be considered ... in light of the evil intended to be remedied by its adoption,” *Smith* held that Section 18 does not apply to the Commonwealth as a defendant because “the [f]ramers ... had no occasion to apply the prohibition against limiting damages to government”

defendants as they were immune by way of sovereign immunity. *Smith*, 516 A.2d at 309. But this analysis errs in two respects. First, as discussed later, the *Smith* Court's conclusion as to the 1874 framers' knowledge of suits against the Commonwealth—for which it provided no support—was incorrect. At the time Section 18 became part of the Constitution, the General Assembly had already enacted legislation waiving sovereign immunity and permitting suit against the Commonwealth. Justice Papadakos recognized this in his dissent. *Smith*, 516 A.2d at 318 (Papadakos, J., dissenting). Second, and more importantly, the *Smith* Court's conclusion ignores the fact that the text of Section 18 unambiguously does not except suits against the Commonwealth. Absent an ambiguity in the constitutional language, we do not look to other indicia of the drafters' intent. The language of Section 18, accordingly, does not leave room for conjecture as to the framers' design. As I detail below, Section 18 is plain and unambiguous—there is no special carve-out for the sovereign.

In sum, *Smith* failed to apply the “rules of constitutional construction recognized at the time” it was decided and now. *McLinko v. Dep't of State*, 279 A.3d 539, 573 (Pa. 2022). The decision engaged in a cursory analysis of the Constitution and failed to moor its holding to Section 11 and Section 18's language. That is not in line with this Court's teachings on constitutional interpretation. Even where the *Smith* Court did provide meaningful analysis, it got it wrong. Its conclusion that suits against the Commonwealth did not exist when Section 18 was adopted is historically inaccurate. More salient, *Smith* ignored our principal tenet of constitutional interpretation—obedience to “the actual language of the Constitution itself.” *League of Women Voters*, 178 A.3d at 802.

In my view, it is impossible to place our imprimatur on the reasoning of the *Smith* Court. The question remains whether despite its patently flawed analysis, the *Smith* Court reached the correct conclusion regarding the authority of the Legislature under Section

11 and Section 18 to place a cap on damages for plaintiffs who otherwise have a right to sue the Commonwealth. After analyzing Section 11 and Section 18 using our recognized rules for constitutional interpretation, I conclude that Section 8528(b)'s limitation on damages is unconstitutional. The General Assembly's authority to control suits against the Commonwealth under Section 11 is broad but it does not grant the power to limit the amount of recovery, where recovery is permitted. Further, pursuant to the plain language of Section 18, limitations on damages are explicitly forbidden, even in actions against the sovereign. I detail my analysis of Section 11 and Section 18 below, in the same order the *Smith* Court did.

Constitutionality of Section 8528(b)

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters*, 178 A.3d at 802; *see also Commonwealth v. Yard*, 323 A.3d 762, 772 (Pa. 2024) ("[W]hen the text of the constitutional provision under review is unambiguous, as it is here, it is the plain language itself which functions as our polestar."). Language contained within our Constitution must be interpreted "in its popular sense, as understood by the people when they voted on its adoption." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017). We have explained that this exercise requires consideration of "the intent of the framers and ... the views of the ratifying voters." *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014). Accordingly, "legislative history" and the "circumstances" surrounding a provision's "enactment and ratification" additionally aid in its interpretation. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 959 (Pa. 2013). At the end of the day, however, "the Constitution's language controls." *Ieropoli*, 842 A.2d at 925.¹⁷

¹⁷ When analyzing a claim that a provision of the Pennsylvania Constitution should depart from the interpretation of an analogous provision in the Federal Constitution, this Court has traditionally considered factors outlined in our seminal case, *Commonwealth v.* (continued...)

Article I, Section 11

Section 11 provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

PA. CONST. art. I, § 11.

Section 11 is comprised of two distinct sentences, each having separate aims. The first sentence guarantees that the Commonwealths' courts shall be open and affords the people a positive right to recover for injuries to their lands, goods, person, or reputation. The second sentence states that suits may be brought against the Commonwealth and simultaneously grants the General Assembly the power to regulate those suits by dictating the manner, courts, and cases in which they may be brought. As we have recognized, Section 11 “merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner” because the General

Edmunds, 586 A.2d 887 (Pa. 1991). Here, there is no departure claim to consider; accordingly, I do not conduct my analysis within the precise rigidity of that framework, although I consider it where helpful. At the outset, I note that one of the *Edmunds* factors, related case law from other states, is not helpful to an analysis of Section 11 or Section 18. While several state constitutions contain provisions akin to Section 11's second sentence, only one contains all three phrases used in the Pennsylvania Constitution. See N.D. CONST. art. I, § 9 (“Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.”). Other state courts' analyses of these provisions lend no aid as they, similar to the *Smith* Court, fail to meaningfully analyze the meaning of “manner,” “courts,” or “cases.” See, e.g., *Troyer v. Dep't of Health & Soc. Servs., Div. of Vocational Rehab.*, 722 P.2d 158 (Wyo. 1986). Fewer state constitutions contain a provision akin to Section 18. See ARIZ. CONST. art. XVIII, § 6; ARK. CONST. art. V, § 32; KY. CONST. § 54; WYO. CONST. art. 10, § 8. The decisions interpreting these provisions are sparse and bear little upon our interpretation of Section 18, given its unique wording and history. In sum, other state courts' jurisprudence in this area does not shed significant light on the meaning of Section 11 or Section 18.

Assembly is assigned the power to decide how, where, and in which cases the Commonwealth is subject to suit. *Mayle*, 388 A.2d at 716. A challenge to the cap on damages centers on the scope of the powers Section 11 assigns to the General Assembly, namely the meaning of manner, courts, and cases.

Dictionaries prevalent at the time Section 11 was added to our Constitution¹⁸ consistently define “manner” as “form [or] method.”¹⁹ “Method,” in turn, is defined as “order [or] arrangement.” *Method*, Ash Dictionary. “Form” references back to “method.” *Form*, Ash Dictionary.

A thorough review of the 1790 Constitution reveals that the framers used the phrasing “in such manner ... as the Legislature may (or shall) by law direct” in a specific context throughout the document.²⁰ For instance, Article I, Section IV dictated that

¹⁸ “In ascertaining the meaning of a word in accordance with its common and approved usage, this Court has found it helpful to consult dictionaries.” *McLinko*, 279 A.3d at 577. “[I] look to definitions from dictionaries in circulation at the time of the adoption of” Section 11. *Allegheny Reprod.*, 309 A.3d at 868 n.50. Section 11 was added to our Constitution during the Convention of 1790 and its form has remained the same, bar the removal of one comma. See Donald Marritz, *Courts to be Open; Suits Against the Commonwealth*, THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, § 14.4[k], 575 (Ken Gormley & Joy G. McNally eds., 2nd ed. 2020).

¹⁹ 1 John Ash, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1795) (hereinafter “Ash Dictionary”); see also Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1773) (hereinafter “Johnson Dictionary”) (defining “manner” as “form; method ... custom; habit; fashion”)

Johnson and Ash’s dictionaries were among “the most useful and authoritative for the English language” during the period of 1750-1800. Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012).

²⁰ The 1790 constitution used this phrasing, with slight variation, in seven separate instances. See PA. CONST. art. I, § 4 (1790) (“Within three years after the first meeting of the General Assembly, and within every subsequent term of seven years, an enumeration of the taxable inhabitants shall be made, in such manner as shall be directed by law.”); PA. CONST. art. I, § 12 (1790) (“Contested elections shall be determined by a committee, to be selected, formed, and regulated in such manner, as shall be directed by law.”); PA. CONST. art. II, § 2 (1790) (“Contested elections shall be determined by a (continued...)”)

“[w]ithin three years after the first meeting of the General Assembly, and within every subsequent term of seven years, an enumeration of the taxable inhabitants shall be made, **in such manner as shall be directed by law.**” PA. CONST. art. I, § 4 (1790) (emphasis added). On April 10, 1793, the General Assembly acted on this mandate and passed “An Act to Provide for the Enumeration of the Taxable Inhabitants of this Commonwealth.” Act of April 10, 1793, 14 Statutes at Large, 408, No. 1683. The act “authorized and required” county commissioners to “cause the names and number of the taxable inhabitants actually residing within their respective counties to be carefully and accurately taken.” *Id.* § I. The General Assembly additionally provided for the procedures by which the taxable residents should be enumerated: the “commissioners shall appoint an assistant” who must take an “oath or affirmation” set forth in the act and “shall receive [] compensation for his services;” the “enumeration shall commence on or before the first day of June” and “shall close on or before the first day of October;” the commissioners “shall file the several returns [] with the clerks ... of their respective counties” and the clerks shall “transmit [the returns] to the governor of [the] [C]ommonwealth;” the governor, in turn, shall “lay the [returns] before the [G]eneral [A]ssembly;” and finally, the assistant shall “set up” a “correct list ... of the taxable inhabitants” at “two of the most public places within” the county. *Id.* §§ I, II, IV, VI, VII, VIII.

committee, to be selected from both Houses of the Legislature, and formed and regulated in such manner as shall be directed by law.”); PA. CONST. art. VI, § 2 (1790) (“The militia officers shall be appointed in such manner, and for such time, as shall be directed by law.”); PA. CONST. art. VI, § 5 (1790) (“All other officers in the treasury department, attorneys [sic] at law, election officers, officers relating to taxes, to the poor and highways, constables, and other township officers, shall be appointed in such manner as is or shall be directed by law.”); PA. CONST. art. IX, § 11 (1790) (“Suits may be brought against the commonwealth in such manner, in such courts, and in such cases, as the legislature may by law direct.”); PA. CONST. art. IX, § 16 (1790) (“That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.”).

The 1790 Constitution also provided that “militia officers shall be appointed **in such manner ... as shall be directed by law.**” PA. CONST. art. VI, § 2 (1790) (emphasis added). Acting on this instruction, the General Assembly passed “An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania.” Act of April 11, 1793, 14 Statutes at Large, 454, No. 1696. This act created different procedures for appointing the various militia officers: “adjutant-general, major-general, brigadier-general and brigade inspectors, shall be appointed ... by the governor;” “majors-general shall appoint their own aides-de-camp” and “field officers” their own “regimental staffs;” finally, “lieutenant-colonels, majors, captains, lieutenants and ensigns, shall be elected.” *Id.* § VII. The act also set forth the “form and manner” of such elections: the “brigade inspectors shall ... give notice, by advertisement at eight or more of the most public places of each regiment bounds or district, ... requiring all the citizens enrolled in the said regiment ... to meet at a certain place as near the cent[er] of the said district as may be, and ... elect by ballot” one of each of the aforementioned officers. *Id.* §§ VII, XI.

These examples shed light on the meaning of the phrase “in such manner ... as ... directed by law” as it was used by the framers of the 1790 Constitution. Both Article I, Section IV and Article VI, Section II set forth a requirement of governance—the enumeration of taxable inhabitants and appointment of militia officers, respectively—but delegate the procedures for executing those requirements to the General Assembly. In both cases, the General Assembly acted on these delegations and set up specific processes to be followed in accomplishing the respective constitutional mandates.

In keeping with dictionary definitions (method or form), contextual applications support an understanding that the phrase “in such manner as [shall or may] be directed by law,” as used in the 1790 Constitution, empowered the General Assembly to set forth

the procedures for carrying out the action described in each respective provision.²¹ In addressing the Federal Constitution’s mandate that state legislatures prescribe the “[m]anner of holding [e]lections for [s]enators and [r]epresentatives,” U.S. CONST. art. I, § 4, cl.1., the High Court has made a similar deduction about the meaning of the word, reasoning that “the Elections Clause [] grant[s] States authority to create procedural regulations.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 (1995). Applying this meaning to the phrase “in such manner” as used in Section 11, the second sentence gives the Legislature the power to set the procedures for suits against the Commonwealth.

The popular meaning of “courts” and “cases” at the time of Section 11’s adoption is easily discerned through contemporaneous dictionaries. In 1790, “court” meant what it means today—“[t]he hall or chamber where justice is administered.” *Court*, Johnson Dictionary; *Court*, Ash Dictionary (same). Similarly, “case” has maintained its same meaning—a “state of facts juridically considered.” *Case*, Johnson Dictionary. “Case” was popularly used to refer to legal cases at that time. See *id.* (offering examples referencing a “lawyer’s cases”). Accordingly, Section 11 would have been understood at the time of its adoption to allow the Legislature to choose the cases in which the Commonwealth may be sued and designate the courts where those suits should be brought.

At the time the 1790 Constitution was adopted, the power to choose the cases in which the Commonwealth may be sued would have been understood in light of the historical understanding of sovereign immunity as it then existed at common law. At the time of Section 11’s enactment, sovereign immunity stood for the proposition that the sovereign “could not be sued in [its] own courts without [its] consent.” *Mayle*, 388 A.2d

²¹ As discussed later, Section 11’s use of the word “may,” as opposed to “shall,” means that the General Assembly is empowered to establish procedures for suits against the Commonwealth but is not required to do so. See *Mayle*, 388 A.2d at 716.

at 710. Sovereign immunity did not serve as a defense that the Commonwealth could raise after claims had been brought; the doctrine established that the sovereign was immune from suit in the first instance. As such, sovereign immunity acted as a jurisdictional bar to courts' ability to hear claims against the sovereign. See *O'Connor v. Pittsburgh*, 18 Pa. 187, 189 (1851) (“[I]t is the prerogative of a sovereign to be exempt from coercion by action; for jurisdiction implies superiority, and a sovereign can have no superior.”); see also *Sci. Games Int’l, Inc. v. Commonwealth*, 66 A.3d 740, 756 n.24 (Pa. 2013) (discussing whether sovereign immunity is better conceptualized as a form “of subject matter jurisdiction” or “personal jurisdiction”); *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (“Sovereign immunity is jurisdictional in nature.”). Accordingly, by permitting the General Assembly to determine “in [which] cases” “[s]uits may be brought against the Commonwealth,” Section 11 grants the power to establish the cases over which courts of this Commonwealth have jurisdiction to hear claims against the Commonwealth.

Turning to history, Section 11 was adopted into the Pennsylvania Constitution in 1790 and has since been part of each iteration of our Commonwealth’s Constitution. Marritz, *supra* § 14.3(c), 537. Section 11, as originally proposed, contained only the first sentence’s right to a remedy provision and made no mention of suits against the Commonwealth. *Id.* At the insistence of James Wilson, “one of the leading legal scholars of his day,” a future United States Supreme Court Justice, and, crucially, “a known opponent of sovereign immunity,” *Mayle*, 388 A.2d at 717 & n.63, the constitutional convention added the second sentence in the following form: “Suits may be brought against the Commonwealth as well as against other bodies corporate and individual,” *id.* at 717. It was understood at the time that this sentence “would constitutionally have abolished sovereign immunity.” *Id.* Shortly after it was added, a motion to reconsider

was approved and the language was changed to what currently exists in our Constitution.
Id.

In the early days of our Commonwealth, the Legislature frequently employed the powers granted to it under Section 11 to permit suits against the Commonwealth. For instance, in 1811, the General Assembly passed the Public Accounts Settlement Claims Act²² which “conferred jurisdiction” on the Auditor General to “examine[] and adjust[] ... according to law and equity” claims “between the [C]ommonwealth, and any person.” *Easton Bank v. Commonwealth*, 10 Pa. 442, 445-46 (1849) (quoting Act of Mar. 30, 1811, P.L. 145, No. 99). This Court explained that “the object of the law-makers was to bring within the adjusting authority of the public agents” all “pecuniary claims” made “against the state” because of “the difficulty of ascertaining the rights and liabilities of the [Commonwealth], except through the tedious, and frequently, utterly inadequate process of a suit at law.” *Id.* at 446. Accordingly, the General Assembly designated a separate “tribunal,” i.e., the Auditor General, in front of which these claims could be heard. *Id.* The Auditor General’s decision, in turn, was subject to review by the state treasurer and, where they disagreed, the governor. See Act of Mar. 30, 1811, P.L. 145, No. 99, § 5. Finally, the governor’s decision was appealable to the court of common pleas, where it was subject to the procedure of “like proceedings ... in common suits.” *Id.* § 11.

The General Assembly set up a similar procedure when it passed the three Canal Acts of 1824, 1825, and 1826. See *generally* Act of Mar. 27, 1824, P.L. 92; Act of Apr. 11, 1825, P.L. 238; Act of Feb. 25, 1826, P.L. 55. These laws grew out of “the rivalry between New York City, Philadelphia, and Baltimore for the trade from the west,” and they authorized the governor to appoint the Board of Canal Commissioners who would oversee the construction of “the Pennsylvania Canal.” Willard R. Rhoads, *The*

²² Act of Mar. 30, 1811, P.L. 145, No. 99.

Pennsylvania Canal, 43 W. PA. HIST. MAG. 207 (1990). Specifically, the Board of Canal Commissioners was empowered to settle claims by private landowners against the Commonwealth for damage to their property resulting from the construction of the canal. Act of Feb. 25, 1826, P.L. 55, § 8. “In the case of disagreement” between the Board and the private landowner, the act delineated the procedure for resolving the claim: the local justice of the peace was required to “summon a jury of eighteen inhabitants of his county, not related to the parties, or in any manner interested[,]” and the jurors would meet at the landowner’s property to determine, inter alia, “all damages the owner [] shall sustain” from the canal’s construction. *Id.* The 1938 Annual Report of the Canal Commissioners reflects that the Board did indeed pay individual claimants for damages to their crops and land. BD. OF CANAL COMM’RS, *Annual Report*, at 36 (1938).

Finally, the General Assembly’s recent practice confirms that Section 11 permits it to establish unique courts and procedures for certain claims against the Commonwealth. Under the Commonwealth Procurement Code,²³ the General Assembly has waived sovereign immunity for “claims arising from certain contracts entered into by a Commonwealth agency” and vested “exclusive jurisdiction” over these claims in a three-member tribunal, the Board of Claims. *Sci. Games Int’l*, 66 A.3d at 756. The Legislature acknowledged that this waiver was enacted “under [S]ection 11 of Article I of the Constitution of Pennsylvania.” 62 Pa.C.S. § 1702. As with other statutory waivers of sovereign immunity, the General Assembly designated specific claims procedures; Section 1725 lays out the requirements for a “statement of claim,” defines the parameters of hearings, and sets the timeline for decisions and appeals. *See id.* § 1725.

²³ The Commonwealth Procurement Code was enacted in 1998, see Act of May 15, 1998, P.L. 358, No. 57 § 1 (as amended, 62 Pa.C.S. §§ 101-2311), and amended to its current state in 2002, see Act of Dec. 3, 2002, P.L. 1147, No. 142.

The Public Accounts Settlement Claims Act, the Canal Acts, and the Commonwealth Procurement Code reinforce the second sentence of Section 11's plain language providing that the General Assembly can determine the cases in which suit against the Commonwealth may be brought, designate the courts where those suits may be heard, and set the procedures for bringing claims in those courts. The General Assembly has used this power to create special courts for hearing claims against the Commonwealth and set unique procedures for bringing those claims. In some instances, the General Assembly has raised the shield of sovereign immunity to completely bar courts from hearing certain cases against the Commonwealth. See 1 Pa.C.S. § 2310 (reaffirming sovereign immunity in all cases except those which the General Assembly has "specifically waive[d]"). The General Assembly's exercise of these powers supports the understanding that each phrase in the second sentence of Section 11—"in such manner," "in such courts," and "in such cases"—has a specific defined meaning.

Although the General Assembly has had occasion since 1790 to employ the power granted to it by Section 11, this Court has seldom addressed the scope of the provision. It was not until this Court abrogated the common law doctrine of sovereign immunity in *Mayle* that the General Assembly enacted the Sovereign Immunity Act and the Tort Claims Act which gave rise to this Court's most substantive discussions of the second sentence of Section 11. First, in *Carroll*, we upheld the Tort Claims Act's grant of immunity to political subdivisions holding that Section 11 "allow[s] the Legislature if [] desired, to choose cases in which the Commonwealth should be immune." *Carroll*, 437 A.2d at 396 (quoting *Mayle*, 388 A.2d at 717). Then, in *Smith*, we rejected a challenge to the Legislature's ability to set a cap on damages in suits against the Commonwealth, expanded the scope of Section 11 established by the *Carroll* Court, and held, without discussion of the Constitution's language, that "the [f]ramers [of the provision] intended

that the [L]egislature have complete control over suits brought against the Commonwealth.” *Smith*, 516 A.2d at 309. Beyond this cursory, all-encompassing conclusion in *Smith*, this Court has never meaningfully analyzed whether the actual powers granted to the General Assembly in Section 11 include the ability to cap recovery in suits against the sovereign.

The text and history of Section 11’s second sentence demonstrate that the provision grants the General Assembly the ability to regulate three distinct aspects of suits against the Commonwealth. First, under the term “cases,” because the General Assembly has the power to affirmatively immunize the Commonwealth from suit for certain actions, it correspondingly has the power to identify cases in which the Commonwealth may be sued. Second, under the term “courts,” the General Assembly may create or designate particular tribunals where claims against the Commonwealth may be pursued. Third, under the term “manner,” the Legislature has control over the procedure by which claims may be brought against the Commonwealth.

While the *Smith* Court concluded that these terms grant the Legislature “complete control over suits brought against the Commonwealth,” *Smith*, 516 A.2d at 309, this conclusion belies the import of the distinct powers given to the General Assembly by each phrase. First, with respect to “in such cases,” an understanding of the nature of sovereign immunity at the time of our Commonwealth’s founding demonstrates that the power to select the cases in which the Commonwealth may be sued grants the General Assembly the prerogative to choose the cases where the Commonwealth’s courts have jurisdiction to hear claims against the sovereign. The General Assembly has employed this power, for example, to give the Board of Claims “exclusive **jurisdiction**” to hear “claims arising from certain contracts entered into by a Commonwealth agency.” *Sci. Games Int’l*, 66 A.3d at 756 (emphasis added).

Second, as evidenced by dictionary definitions and its use throughout the 1790 Constitution, “in such manner” means the method or procedure for performing an action. Accordingly, Section 11 gives the General Assembly latitude to prescribe the method or procedure for bringing suits against the Commonwealth. For example, it can require that claims initially be brought before the Auditor General prior to proceeding before the Court of Common Pleas, *see Easton Bank*, 10 Pa. at 445, or mandate that a claim be heard in front of an eighteen-person jury at the site of the alleged injury, *see* Act of Feb. 25, 1826, P.L. 55, § 8. Section 11 also allows for pre-suit notice requirements. *See* 42 Pa.C.S. 5522 (requiring individuals bringing suit against a government unit for damages to give notice within six months of the alleged injury). In sum, the term “manner” grants the Legislature discretion to control how a case proceeds against the Commonwealth.

Control over the manner in which suits proceed, however, does not entail control over the substantive aspects of those suits. Contextual applications of the phrase “in such manner” from the 1790 Constitution reveal that the phrase enabled the Legislature to set “procedural regulations” on the action described in the respective provision. *Thornton*, 514 U.S. at 832. Procedural regulations, of course, differ from regulations on the underlying substance of an action. Accordingly, “in such manner” as used in Section 11 only imparts the power to establish rules prescribing the steps of bringing a claim against the Commonwealth, not the power to change the substantive aspects of that claim.

Article III, Section 18

Section 18 provides:

The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and

fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but **in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property**, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

PA. CONST. art. III, § 18 (emphasis added).

The emphasized text of Section 18 has been subject to little debate regarding its meaning. First, Section 18 empowers the General Assembly to enact laws regulating claims by employees against employers for injuries sustained in the course of employment. For these claims, which we now refer to as workers' compensation claims, the General Assembly is permitted to establish "the basis" for calculating damages, including the establishment of "maximum and minimum limits" for damages. *Id.* Next, and relevant here, Section 18 prohibits the General Assembly from "limit[ing] the amount to be recovered for injuries resulting in death, or for injuries to persons or property" in all "other cases." *Id.* Freilich challenges the General Assembly's limitation on damages to be recovered for injury to her person. Accordingly, I focus on that language.

The meaning of Section 18 is readily apparent: other than in the cases described in the first part of the provision (i.e., workers' compensation cases), the General Assembly is not permitted to limit the amount to be recovered for personal injury. At the time Section 18 was adopted into our Constitution,²⁴ Black's Law Dictionary defined "injury" as "[a]ny wrong or damage done to another." *Injury*, BLACK'S LAW DICTIONARY, 627 (2nd ed. 1910).

²⁴ Section 18 was adopted in the Constitution of 1874. *Smith*, 516 A.2d at 309.

Specifically, “personal injury” is defined as “[a] hurt or damage done to a man’s person, such as a cut or bruise, a broken limb, or the like[.]” *Personal injury*, BLACK’S LAW DICTIONARY, 627 (2nd ed. 1910). Finally, recovery is defined as “the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withheld from him.” *Recovery*, BLACK’S LAW DICTIONARY, 1000 (2nd ed. 1910). Accordingly, except in cases between employers and employees arising from injuries sustained in the course of the employee’s employment, Section 18 prohibits the enactment of any law limiting the amount a person may recover by bringing suit for personal injury.

Section 18’s genesis was in the years preceding the adoption of the 1874 Constitution when the General Assembly began the practice of passing statutes limiting recovery “in negligence actions against railroads and other common carriers.” *Smith*, 516 A.2d at 309. The 1874 framers “suspected” that lobbying by “certain powerful corporations” played a significant role in the adoption of these statutes. Thomas R. White, *Commentaries on the Convention to Amend The Constitution of Pennsylvania* 270 (1907). For example, the participants in the debates of the Constitutional Convention of 1872-73 specifically referenced the Railroad Act which limited recovery against “common carriers or corporations owning, operating or using a railroad” to \$3000 “in case[s] of personal injury” and \$5000 “in case[s] of loss of life.” Railroad Act § 2. Section 18 was added to the 1874 Constitution to address these laws.²⁵ This Court recognized as much, observing that Section 18 “was drafted and approved to invalidate the [Railroad Act], and

²⁵ Section 18 was originally numbered as Article III, Section 21 but “was renumbered by the Constitution of 1967.” *Singer v. Sheppard*, 346 A.2d 897, 900 n.8 (Pa. 1975). Other than an amendment in 1915 to modify the language “to permit the enactment of a Workmen’s Compensation Act,” Section 18 has remained unchanged since the 1874 Constitution. *Id.* at 900.

to prevent the passage of similar legislation in the future.” *Singer*, 346 A.2d at 901. Indeed, nine years after Section 18 was ratified, this Court held that the Railroad Act violated its bar on “legislation limiting the amount to be recovered for injuries resulting in death, or for injuries to persons or property.” *Lewis v. Hollahan*, 103 Pa. 425, 430 (1883).²⁶

It was not until 1975 that Section 18 was invoked as a basis to strike down another non-workers’ compensation law.²⁷ The law at issue in *Singer* was the Pennsylvania No-fault Vehicle Insurance Act (“No-fault Act”)²⁸ which established a statewide system for compensating individuals injured in motor vehicle accidents. In exchange for the insurance based recovery of economic losses in all cases regardless of fault, the No-fault Act generally eliminated tort liability for motor vehicle accidents, subject to certain exceptions. One of these exceptions permitted recovery for non-economic damages arising out of “reasonable and necessary medical [] services ... in excess of [\$750].” 40 P.S. § 1009.301(5)(B). The plaintiff in *Singer* challenged the No-fault Act under Section 18, arguing that it unconstitutionally “eliminate[d] as a compensable item of damages the non-economic” damages suffered by an injured party, absent meeting one of the listed

²⁶ When first asked to apply Section 18 to the Railroad Act, this Court held that the defendant company in that case “had formally accepted the provisions” of the Act into “the charter of the company,” making it such that Section 18 did “not apply” because the “corporation[’s] [charter] existed prior to the adoption of the constitution.” *Pa. R. Co. v. Langdon*, 92 Pa. 21, 35 (1880). We corrected course, however, in *Pennsylvania Railroad Co. v. Bowers*, 16 A. 836, 838 (Pa. 1889), where we held that the Act was “avoided by the present [C]onstitution” and “overruled” *Langdon* insofar as “it refer[ed] to the effect of the present [C]onstitution upon the [A]ct.”

²⁷ After the turn of the twentieth century, Section 18 litigation was dormant, except for a case concerning the Workmen’s Compensation Act of June 2, 1915, P.L. 736, which is not relevant to our inquiry here. See *Anderson v. Carnegie Steel Co.*, 99 A. 215 (Pa. 1916).

²⁸ Act of July 19, 1974, P.L. 489, as amended 40 P.S. §§ 1009.101 et. seq. (repealed 1984).

exceptions, i.e., the \$750 threshold. *Singer*, 346 A.2d at 901. In other words, the plaintiff claimed that the No-fault Act “limited” recoverable damages to “economic losses,” making “recovery for their actual damages [] incomplete.” *Id.*

After providing a scholarly history of Section 18, this Court concluded that the No-fault Act did not place any limits on an individual’s recovery. Instead, it viewed the Act as creating “two classes of motor vehicle accident victims each with different items of compensable damage.” *Id.* In both classes, the Court observed, damages “are compensable without limit.” *Id.* While it acknowledged that the Act’s creation of two classes—plaintiffs who could recover both non-economic and economic damages and plaintiffs who could recover only economic damages—may raise “substantial equal protection questions,”²⁹ the Court reasoned that a law cannot offend Section 18 where it does not place an actual cap on recovery. *Id.* at 902. In this regard, it compared the No-fault Act to the Railroad Act which “placed absolute dollar maximums on the damages recoverable by the negligently injured plaintiff.” *Id.* The Court stated that “the full scope and meaning” of Section 18 “should be considered ... in the light of the evil intended to be remedied by its adoption,” namely, the Railroad Act. *Id.* at 901 (quoting *Lewis*, 103 Pa. at 430). Unlike the Railroad Act, the No-fault Act did not place an “absolute dollar maximum[],” and we therefore upheld the statute. *Id.* at 902

This leads to *Smith*, where this Court declined to apply Section 18 to the Tort Claims Act’s cap on damages. The *Smith* Court relied on the *Singer* Court’s statement that Section 18 must be considered “in the light of the evil intended to be remedied by its adoption” to conclude that “the [f]ramers were addressing themselves to private, not governmental defendants.” *Smith*, 516 A.2d at 309. The Court reached this conclusion

²⁹ Later in its decisions, the Court determined that the No-fault Act did not violate the Equal Protections Clause of the Fourteenth Amendment.

by reasoning that Section 18's "[f]ramers would have had no occasion to apply the prohibition against limiting damages to government, for government, at that time, was immune from suit." *Id.* Accordingly, it held that Section 18 does not prohibit the General Assembly from capping recovery against the Commonwealth.

As noted in my discussion of Section 11, however, the *Smith* Court's assumption that the 1874 framers were unfamiliar with suits against the Commonwealth was incorrect. Throughout the nineteenth century, the General Assembly, on multiple occasions, legislated to permit suits against the Commonwealth. See *supra* pp. 27-29. The Public Accounts Settlement Claims Act and the Canal Acts, both enacted before the adoption of the 1874 Constitution, permitted suits for damages against the Commonwealth under limited circumstances. Justice Papadakos acknowledged this in his *Smith* dissent. See *Smith*, 516 A.2d at 318 (Papadakos, J., dissenting) ("Extensive legislation already existed in 1874 permitting suits against the Commonwealth."). The fact that the General Assembly had been in the practice of enabling suit against the Commonwealth at the time of the 1872-73 convention lends itself to the opposite conclusion drawn by the *Smith* Court. Of the 142 delegates present at the 1872-73 constitutional convention, nearly a third had served as a member of the General Assembly. Naomi R. Lamoreaux & John Joseph Wallis, *General Laws and the Emergence of Durable Political Parties: The Case of Pennsylvania*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 13 n.26 (2025). These delegates would have been well aware of the legislation passed throughout the nineteenth century that opened the Commonwealth to liability for money damages. If they intended to exclude suits against the Commonwealth from Section 18's general prohibition of caps on damages, they would have said so in the language of the provision. The fact that they did not is controlling.

In sum, Section 18's language is plain and unambiguous—the General Assembly may not enact legislation limiting the amount to be recovered by plaintiffs in cases of personal injury or injury to property, except with regards to workers' compensation cases. Moreover, the full scope and history of the 1874 Constitution make apparent that the framers were quite familiar with suits against the Commonwealth. Despite this, Section 18 was drafted and adopted without any exception for suits against the Commonwealth. It is a bedrock rule of constitutional interpretation in this Commonwealth that “the Constitution's language controls.” *Ieropoli*, 842 A.2d at 925. Here, where Section 18 contains no textual indicium that the Commonwealth is excepted from its command, we should not read one in. A faithful reading of Section 18 reveals that the General Assembly may not enact legislation capping damages in suits for personal injuries against any defendants.

Application of Article I, Section 11 and Article III, Section 18 to Section 8528(b)³⁰

Section 11 and Section 18 independently and unambiguously prohibit the General Assembly from imposing a cap on the damages recoverable by a plaintiff for personal injuries where sovereign immunity has been waived. At issue is the second sentence of Section 11, particularly the terms “cases” and “manner.” The power to establish the “cases” in which the Commonwealth is subject to suit permits the General Assembly to select the cases where Pennsylvania courts have jurisdiction to hear claims against the sovereign. This includes the power to grant jurisdiction for “claims arising from certain contracts” but not for others. *Sci. Games Int'l*, 66 A.3d at 756. Next, the term “manner” gives the General Assembly power to control the procedural aspects of cases against the

³⁰ As a reminder, Section 8528(b) provides that for suits where sovereign immunity is waived, “[d]amages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.” 42 Pa.C.S. § 8528(b).

Commonwealth. Historically, this included procedures such as the initial presentation of claims to the Auditor General or the requirement that claims be heard in front of an eighteen-person jury. Currently, statute requires claimants bringing suit against the Commonwealth to provide pre-suit notice within six months of the alleged injury. See 42 Pa.C.S. § 5522. Section 11's grant of power to set the "manner" of suits against the Commonwealth permits the General Assembly to set regulations, akin to those detailed above, on the way in which such suits proceed.

A cap on damages is not a mechanism by which cases are included or excluded from the bar of sovereign immunity. The ability to select which courts have jurisdiction to hear claims against the Commonwealth does not include the power to alter the amount of damages awarded in those cases. Jurisdiction and recovery are two distinct and unrelated legal concepts. By limiting the amount of damages available in the claims for which the Commonwealth has otherwise consented to suit, the General Assembly is not acting within the power granted by the term "cases" in Section 11.

Similarly, a damages cap is not a rule prescribing the method in which a suit proceeds. In setting a cap on damages, the Legislature affects the substance of a claim, not its procedure. It is clear that damages are a matter of substantive law, not procedural. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) ("a statutory cap on damages would supply substantive law."); *Arpin v. United States*, 521 F.3d 769, 776 (7th Cir. 2008) ("damages law is substantive law"); *Murray v. Janssen Pharm., Inc.*, 180 A.3d 1235, 1252 (Pa. Super. 2018) (noting that a "damages cap [is] a substantive limitation"); *Erie Insurance Exchange v. Heffernan*, 925 A.2d 636, 653 (Md. 2007) (holding that a state statute capping non-economic damages is "the substantive law of Maryland, not [] procedural law"). The *Zauflik* Court acknowledged as much, holding that the Tort Claims Act placed "a **substantive** limit on the damages ultimately recovered." *Zauflik*, 104 A.3d

at 1132. Accordingly, Section 11’s authorization for the General Assembly to dictate the “manner” in which suits can be brought against the Commonwealth does not permit it to limit damages in suits against the Commonwealth because a cap on damages is not part of the procedure for bringing a claim.

In addition, Section 18 provides that, except in cases between employers and employees, the General Assembly may not enact limits on the amount of recovery for plaintiffs in cases of injury to person or property. This mandate is clear and unambiguous. Further, both the plain language of Section 18 and its historical context—demonstrating that the Commonwealth was subject to suit before the adoption of Section 18—support the reading that there is no exception for cases against the Commonwealth and its subdivisions. Section 18 does not allow for damages caps. Period.

In sum, the General Assembly is not permitted to set limits on recovery against the Commonwealth where it has otherwise waived sovereign immunity. Under Section 11, the General Assembly may determine the cases in which claims can be brought against the Commonwealth, the courts that hear such cases, and the procedure for bringing such claims. Limits on recovery do not fall within this authorization. Moreover, Section 18 independently and specifically prohibits statutes limiting damages for injury to person or property. The General Assembly’s control over suits against the Commonwealth under Section 11 is broad, but where sovereign immunity is waived, legislation limiting recovery in suits against the Commonwealth for personal injury is beyond the powers enumerated in Section 11 and specifically prohibited by Section 18.

Stare Decisis

As evidenced, a proper constitutional analysis of Section 11 and Section 18 departs from the conclusions reached by the *Smith* Court. Regardless, subsequent courts cannot discard precedent simply because it reaches a different result in its

analysis. “The appropriateness of overruling a past decision depends on a number of factors, including the age and lineage of the decisions, as well as the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, ... and reliance on the decision.” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 309 A.3d 808, 850 (Pa. 2024) (internal quotation omitted). Stare decisis does not “demand[] absolute fidelity to what came before.” *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020). It is “a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.” *Pa. State Ass’n of Cnty. Comm’rs v. Commonwealth*, 52 A.3d 1213, 1230 (Pa. 2012) (quoting *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 730-31 (Pa. 2009)). Importantly, “[s]tare decisis is at its weakest in the context of constitutional interpretation.” *Allegheny Reprod.*, 309 A.3d at 850; see also *Ramos*, 590 U.S. at 106-07 (2020) (Stare decisis “is at its weakest when we interpret the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means.”) (internal quotations and footnotes omitted). I will address each stare decisis factor as it relates to *Smith* in turn.

a. Quality of reasoning

Under the quality of the reasoning factor, a court must determine whether “by any rules of constitutional construction recognized at the time of those decisions or now, the interpretation is patently flawed.” *McLinko*, 279 A.3d at 573. Lack of analytical “rigor” often reflects a defect in a decision’s reasoning. *William Penn School District*, 170 A.3d at 457. “[T]he stare decisis doctrine cannot be used as an absolute shield to protect and perpetuate legal error regardless of whether the flaw existed at the time the decision was rendered or manifested itself through subsequent interpretations of the decision.” *Allegheny Reprod.*, 309 A.3d at 883.

As demonstrated in the previous discussion, *Smith* is entirely deficient with respect to its analysis of the Constitution. See *supra* pp. 16-20. The decision bucks this Court’s principal tenet of constitutional interpretation—adherence to the text itself. See *League of Women Voters*, 178 A.3d at 802. Moreover, the *Smith* Court based its analysis on a demonstrably incomplete and incorrect understanding of the history of legislation permitting suits against the Commonwealth. At base, *Smith* reached the incorrect result via an improper constitutional analysis; the quality of its reasoning does not support obedience to its holding.

b. Workability of the rule

The workability factor requires the court to assess whether the rule established by the questioned precedent suffered from “practical deficiencies” making it difficult to apply. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). The factor is not relevant where, as here, the prior decision’s holding established a brightline rule. See *Smith*, 516 A.2d at 309 (holding that the Commonwealth has limitless control over suits against it). My conclusion as to the meaning of Section 11 and Section 18 produces an equally clear mandate: The General Assembly may not pass legislation limiting the amount of damages recoverable in suits against the Commonwealth, where such suits are permitted. Neither interpretation requires an elaborate balancing test or cumbersome multifactored analysis. Thus, this factor does not counsel for or against retaining *Smith*.

c. Age and lineage

“[T]he strength of the case for adhering to [a precedent] grows in proportion to [its] antiquity.” *Alexander*, 243 A.3d at 196 (quoting *Gamble v. United States*, 587 U.S. 678, 691 (2019)). Stare decisis weighs heavier where an interpretation “must overcome numerous major decisions of this Court.” *Gamble*, 587 U.S. at 691 (internal quotation marks omitted). “[C]ourts are generally more hesitant to overturn longstanding decisions

involving questions of statutory interpretation, reasoning that the longer the decision has been on the books, the longer the legislature had to step in if they felt something needed to be corrected.” *Allegheny Reprod.*, 309 A.3d at 887 (citing *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991)). When a precedent involves constitutional interpretation, by contrast, its age and lineage is afforded less weight. *Id.*

Smith is nearly forty years old, so it is neither recently decided nor antiquated. In *William Penn School District*, for instance, we overruled *Marrero*, a case that was, at that time, nearly twenty years old. *William Penn School District*, 170 A.3d at 457. This Court has on multiple occasions overruled cases of even longer vitality. See, e.g., *Flagiello v. Pa. Hosp.*, 208 A.2d 193 (Pa. 1965) (overruling the doctrine of charitable immunity which originated in *Fire Insurance Patrol v. Boyd*, 120 Pa. 624 (1888)); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979) (overruling the doctrine of caveat emptor established in *Moore v. Weber*, 71 Pa. 429 (1872)); *Allegheny Reprod.*, 309 A.3d at 891 (overruling an interpretation of the Article I, Section 28 of the Pennsylvania Constitution established in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (1985)). Further, there are not “numerous major decisions of this Court” which stand in the way of overruling *Smith*. *Gamble*, 587 U.S. at 691. *Zauflik* reaffirmed *Smith*, largely relying on its holding. See *Zauflik*, 104 A.3d at 1124-29. As such, neither the age nor lineage of *Smith* weighs in favor of its retention.

d. Reliance

“[W]hen asked to overturn precedent,” this Court has “recognized the importance of reliance on settled jurisprudence.” *Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006). Where our interpretation impacts the Legislature’s ability to enact law, this Court has stated that precedent “should not be undercut except for good reason” because the Legislature presumably relies on that “precedent when crafting legislation.” *Id.*

Ultimately, this inquiry “focuses on the legitimate expectations of those who have reasonably relied on the precedent.” *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring).

The General Assembly does not appear to have relied on *Smith* since it was decided. At the time it was handed down, the General Assembly had already enacted both the Tort Claims Act and the Sovereign Immunity Act, including their respective caps on damages. See 42 Pa.C.S. § 8528; *id.* § 8553. The General Assembly has not amended these caps since their inception, other than to exempt claims involving sexual abuse. See Act of Nov. 26, 2019, P.L. 641, No. 87, §§ 6, 8. The General Assembly has “craft[ed]” no new legislation in reliance on *Smith*. *Stilp*, 905 A.2d at 967. Further, to the extent that the General Assembly has relied on the cap in structuring the finances of the government, it can revisit that decision when it next adopts its yearly capital budget. See PA. CONST. art. VIII, § 13 (requiring the General Assembly to adopt an operating budget yearly). The General Assembly remains free to regulate suits against the Commonwealth in any of the ways provided in Section 11 by identifying the cases in which sovereign immunity is waived, designating the forum for hearing those cases, and the procedures to be followed in addressing those cases. No concrete reliance interests counsel adherence to *Smith*.

e. Conclusion

Presented with Freilich’s challenge to the constitutionality of Section 8528(b), I would overrule *Smith*. The flaws in the *Smith* Court’s reasoning are not rectified by reliance interests or interests in the decision’s jurisprudential lineage, which are considerably unweighty. In sum, stare decisis weighs in favor of discarding *Smith*.

The structured analyses of Section 11 and Section 18, detailed above, demonstrate that Section 8528(b)’s cap on damages is unconstitutional. Nevertheless,

as the Court recognized in our order granting allowance of appeal, the question remains whether Section 8528(b) is severable from the waiver of sovereign immunity granted by Section 8522(a). For the reasons that follow, I conclude that Section 8528(b) is severable from the rest of the Sovereign Immunity Act.

Severability of Section 8528(b)

Under the Statutory Construction Act, unconstitutional provisions of statutes are presumptively severable. See 1 Pa.C.S. § 1925; see also *Stilp*, 905 A.2d at 970 (“[T]he Statutory Construction Act ... establishes a presumption of severability.”). “[W]hen confronted with a finding that a provision of a statute is invalid,” this Court has described the presumption of severability as “fundamental to our [interpretive] task.” *Stilp*, 905 A.2d at 970. Accordingly, this Court will only find a provision inseverable where

[1] the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or ... [2] the remaining valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925. This two-pronged test found in the Statutory Construction Act “merely codified [] settled” doctrine that found “its roots in the common law.” *Stilp*, 905 A.2d at 970. This Court has often recognized that “the fact that an unconstitutional provision is found within an otherwise valid section does not preclude its severance.” *Commonwealth v. Williams*, 832 A.2d 962, 986 (Pa. 2003).

The first prong of the severability analysis asks whether “the General Assembly would have enacted” the remainder of the Sovereign Immunity Act without Section 8528(b)’s limitation on damages. 1 Pa.C.S. § 1925. As discussed, the Sovereign Immunity Act allows suits against the Commonwealth through two distinct steps. First, Section 8522 waives the defense of sovereign immunity—otherwise applicable pursuant

to 1 Pa.C.S. § 1925—for claims resulting from certain enumerated acts, including the Commonwealth’s operation of motor vehicles. 42 Pa.C.S. § 8522. This section additionally states that sovereign immunity is waived “only to the extent set forth in this subchapter and within the limits set forth in [S]ection 8528.” *Id.* Section 8528(b), of course, curtails the amount of damages recoverable in claims where sovereign immunity is waived. Additionally, Section 8528(c) limits the types of damages recoverable in such claims. See *id.* § 8528(c) (limiting recoverable damages to “[p]ast and future loss of earnings,” “[p]ain and suffering,” “[m]edical and dental expenses,” “[l]oss of consortium,” and “[p]roperty losses”).

Considering the Sovereign Immunity Act as a whole, nothing in the statute suggests that the General Assembly would have declined to enact it without Section 8528(b). The Sovereign Immunity Act was “intended to specifically respond to and prescribe limitation on [this Court’s] decision of *Mayle*.” Act of Sept. 28, 1978, P.L. 788, No. 152, § 5(a). But even absent the cap on damages, the act continues to effectuate the General Assembly’s intent of limiting actions against the Commonwealth. For example, Section 8528(c) limits the types of damages available in actions against the Commonwealth and prohibits recovery for damages not listed in that subsection, such as punitive damages and awards of attorneys’ fees.³¹ See Joint State Government Commission Taskforce, *Report on Sovereign Immunity*, 20-21 (1978) (explaining that these types of damages were specifically excluded).³² Similarly, Section 8522(b) only

³¹ This Court has held that “no violation of [] Section 18 occurs” where the General Assembly limits the types of “compensable damages” available for a claim but permits recovery “without limit” for the types of damages which are allowed. *Singer*, 346 A.2d at 901-02. Regardless, a challenge to Section 8528(c)’s limitation on the types of damages available is not before us.

³² In 1974, four years before this Court abrogated sovereign immunity as a constitutional matter in *Mayle*, the General Assembly created a Joint State Government Task Force Sovereign Immunity (the “Task Force”) to explore “the benefits and costs accruing from (continued...) ”

permits claims against the Commonwealth for damages caused by ten specific actions; claims arising from actions not listed in this subsection continue to be barred. See *id.* at 15 (explaining that other claims, such as product liability and constitutional violations, were specifically excluded). The Sovereign Immunity Act, therefore, places meaningful restrictions on suits against the Commonwealth even without Section 8528(b)'s limitation on damages.

Legislative history supports the conclusion drawn from the structure of the Sovereign Immunity Act that the General Assembly would have made it law, even without the cap on damages. The Task Force acknowledged that “sovereign immunity ha[d] never [before] been waived for claims arising out of tortious actions” but simultaneously reasoned that “the Commonwealth should be liable to suit in cases involving negligence of its employees.” *Id.* at 1. Accordingly, it proposed a middle-ground: “[T]o retain sovereign immunity but allow for specific limited waivers.” *Id.* at 9. The Task Force proceeded to recommend a handful of limitations to which claims against the Commonwealth would be subject. These included enumerating eight types of claims which would be allowed, retaining certain defenses, limiting the types of damages permitted, and, finally, setting a cap on the amount of damages recoverable. In other words, the damages cap was but one of many regulations on claims against the Commonwealth that the drafters of the Sovereign Immunity Act considered when framing the scope of a limited waiver of sovereign immunity. There is no indication—in the legislative history or text of the statute—that the General Assembly would have scrapped the whole Sovereign Immunity Act if it did not include one of these regulations, such as the damages cap. In the absence

a statutory revision or abolition of the sovereign immunity defense.” Joint State Government Commission Taskforce, *Report on Sovereign Immunity*, 2 (1978). The Task Force provided the legislative recommendation that ultimately became the Sovereign Immunity Act.

of such evidence, the presumption of severability contained within the Statutory Construction Act counsels us to find unconstitutional provisions severable from the greater statutes that house them.

The Task Force's report even reveals that it "was aware" that Section 18 may bar the General Assembly from including a damages cap in the Sovereign Immunity Act. Joint State Government Commission Taskforce, *Report on Sovereign Immunity*, 19 (1978). It reasoned, however, that Section 18 "must be read in the light of the constitutional prohibition of suits against the Commonwealth" and that Section 11 permitted it to "affix any limitations it chooses to its waiver." *Id.* Despite this then-unanswered constitutional question, the Sovereign Immunity Task Force recommended that the General Assembly adopt a cap. *Id.* at 20. The Task Force's decision to include the damages cap in light of its questionable constitutionality and to simultaneously leave out any provision making the damages cap non-severable indicates that the Task Force did not view the cap as the essential element of the Sovereign Immunity Act.

Arguing that Section 8528(b) is inseverable from the rest of the Sovereign Immunity Act, SEPTA relies on Section 8522(a) which waives sovereign immunity as a defense to the enumerated claims but does so "within the limits set forth in [S]ection 8528." 42 Pa.C.S. § 8522(a). SEPTA contends that this language makes clear that the two sections "were enacted together and are inseparable from each other." SEPTA's Brief at 45 (emphasis omitted). But this argument fails to grapple with the fact that Section 8528 contains a limitation on claims against the Commonwealth other than Section 8528(b)'s cap on damages. As explained above, Section 8528(c) limits the types of damages recoverable in actions against the Commonwealth and excludes awards of punitive damages or attorneys' fees. My conclusion that Section 8528(b)'s damages cap is unconstitutional leaves this separate aspect of the section untouched. Accordingly, the

waiver of sovereign immunity housed in Section 8522 remains limited by the regulation on the types of damages available housed in Section 8528. A ruling that the damages cap is unconstitutional does not destroy Section 8522's reference to Section 8528.

The second prong of the severability analysis asks whether remaining constitutional provisions are complete and capable of being executed absent the excised unconstitutional provision. 1 Pa.C.S. § 1925. This prong is more easily addressed because, as Freilich recognizes, the General Assembly already permits uncapped recovery for claims against the Commonwealth where the injury arises from sexual abuse "caused by actions or omissions of [a] Commonwealth party which constitute negligence." 42 Pa.C.S. § 8522(b)(10). In 2019, the General Assembly amended the Sovereign Immunity Act to permit these claims and specifically excepted them from Section 8528(b)'s cap on damages. See 42 Pa.C.S. § 8528(d). This demonstrates that the Sovereign Immunity Act "can stand alone" without the cap on damages and that the cap is "not integral to the workings of the comprehensive system" established by the act. *Stilp*, 905 A.2d at 970, 973. Without the cap, all the specified claims for which sovereign immunity is waived pursuant to 8522(b) will simply function without a limitation on recovery, as claims relating to sexual abuse already do.

Neither prong of the severability analysis supports a finding that Section 8528(b) is inseverable from the rest of the Sovereign Immunity Act. The structure and history of the act demonstrate that the General Assembly intended to place a myriad of limitations on claims against the Commonwealth, and the cap on damages represents one piece of the complex regulatory framework that it established. Nor would striking the damages cap make the Sovereign Immunity Act unworkable because claims arising from sexual abuse already function without any limit on recovery. Absent these showings, the Statutory Construction Act instructs us to presume that "the remainder of the statute, and

the application of such provision to other persons or circumstances, shall not be affected” by the invalidity of one of the statute’s provisions. 1 Pa.C.S. § 1925. Thus, Section 8528(b) should be severed from the rest of the Sovereign Immunity Act and Section 8522’s waiver of sovereign immunity stands subject only to the other valid limitations set forth within the act. The trial court’s order molding Freilich’s stipulated verdict should be reversed. I respectfully dissent.

Justice McCaffery joins this dissenting opinion.